Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

R. J. CORMAN RAILROAD CORPORATION,

Petitioner,

vs.

LOUISVILLE GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the construction and maintenance of a twelve inch high pressure natural gas pipeline crossing, across a railroad right-of-way, at a depth of some 5½ feet below the grade level of the railroad's road bed, involve a taking of property rights of the railroad, as to which the railroad is entitled to due process of law and just compensation for the property interest taken?

LIST OF ALL PARTIES

1. The Petitioner is R. J. Corman Railroad Corporation.

2. The Respondent is Louisville Gas and Electric Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	ii
REPORTS OF OPINIONS	1
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 5, 6, 7, 8

Western Union Tel. Co. v. Pennsylvania R.R. Co., 195 U.S. 540 (1904) 6, 8

REPORTS OF OPINIONS

There are no reported opinions. The opinions are all appended hereto and include (1) the written order and opinion of the Nelson Circuit Court and (2) the Opinion of the Court of Appeals of Kentucky. Action by the Supreme Court of Kentucky was by order without opinion, but is also appended.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED:

The decision of the Supreme Court of Kentucky sought to be reviewed (denying the Petitioner's Motion for Discretionary Review by that Court) was rendered on October 7, 1998.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Amendment V to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service at the time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

> himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of Amendment XIV to the Constitution of the United States provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

R. J. Corman Railroad Corporation is a short line railroad which hauls plastics, grain and other commodities along its railway, which runs from Bardstown, in Nelson County, Kentucky, to Clermont, in Bullitt County, Kentucky.

Louisville Gas and Electric Company is a public utility which, among other things, owns and operates a natural gas distribution pipeline system in portions of Central Kentucky, including Nelson County.

It is occasionally necessary for the gas company to construct an underground pipeline crossing the railroad's right-of-way; and, on those occasions in the past, the gas

company has acquired from the railroad a license to do so.

In the spring of 1996, the gas company was again engaged in a pipeline construction project, which included the construction of a 12 inch high pressure natural gas pipeline, housed in a 16 inch casing, across the right-of-way of the railroad, some 2,000 feet from the railroad's mile marker 41 and some 930 feet from the centerline of Kentucky Highway 245, at a depth of some 5½ feet from the present road bed at that location. Although the gas company applied to and began negotiating with the railroad for a license to construct and maintain the pipeline crossing, in May of 1996 it abruptly terminated those negotiations and asserted the right to construct and maintain its pipeline crossing on the strength of an easement granted to the gas company by the holder of the reverter interest in the railroad's right-of-way at the site of the crossing.

Following an abortive round of self help remedies, during which the gas company undertook to enter upon the railroad's right-of-way and construct the pipeline crossing and in which the railroad, upon discovery of same, promptly undertook to remove the materials placed there by the gas company and restore the right-of-way to its original condition, the gas company commenced the action below by filing its complaint for trespass and damages resulting from the railroad's efforts to prevent the construction of the pipeline crossing. The railroad responded with a counterclaim demanding damages for the gas company's trespass on its right-of-way

and a judgment declaring that the construction and maintenance of the subject pipeline crossing constitutes a taking which the gas company can only lawfully acquire through negotiation or by condemnation proceedings.

After entering a temporary Order maintaining the status quo, the trial Court directed that the matter be treated as if pending on cross motions for summary judgment and ordered an expedited briefing schedule. Upon submission of the case for decision, the trial Court entered its Judgment denying relief to the railroad, declaring that:

> . . . LG&E has the right to cross Corman's right-of-way so long as it does not interfere with a reasonable use of the right-of-way for the purposes intended.

The railroad appealed that decision to the Court of Appeals of Kentucky, which affirmed the trial Court's Judgment, stating:

> As there is no question but that the construction of a gas pipeline beneath the railroad right-of-way will not interfere with the railroad's use of the right-of-way easement, the circuit court properly dismissed the Corman's complaint [sic], should read *counterclaim*.

The railroad then sought Discretionary Review by the Supreme Court of Kentucky, which was denied.

As indicated above, the Petitioner railroad demanded in its counterclaim before the court of first instance a judgment declaring that the gas company could not physically intrude upon the railroad's right-of-way without condemning the right to do so. The Petitioner reiterated

that argument on appeal and on motion for discretionary review, and the constitutional question presented here was thus presented at every step in the proceedings below.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case involves issues under the Fifth and Fourteenth Amendments to the Constitution of the United States which were well settled by this Court in *Loretto v. Teleprompter Manhattan CATV Corp., et al.*, 458 U.S. 419 (1982). In *Loretto*, this Court adopted a simple, easy to apply, bright line rule: Whenever there is a governmentally authorized physical possession of real property, even if comparatively minor and even if for the public good, that is a "taking" within the constitutional requirements of due process and just compensation. In so doing, this Court expressly recognized its prior teachings that the right to compensation extends to a taking for the installation of underground pipelines "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Loretto*, 458 U.S. at 478.

The Kentucky courts below have simply ignored the rule of *Loretto*, and have held that there is no taking, as to a railroad's right-of-way, by the creation of a utility easement authorizing and actually including the physical possession of a part of that right-of-way, as long as there is no unreasonable interference with the railroad's present

use of its property. Nothing in *Loretto* suggests such an exception to its application.

This Court should grant the petition for writ of certiorari in order to preserve the rule in *Loretto*, and to make clear that the rule does not avail itself of exceptions of convenience or public interest, such as the Kentucky courts would create.

The writ should also be granted to preserve the holding in *Western Union Tel. Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540 (1904), in which this Court considered the property nature of a railroad company right-of-way and held, at page 570:

> A railroad's right-of-way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given.

The teachings of *Western Union* have continued until modern times, including its citation, with approval, in *Loretto v. Teleprompter Manhattan CATV Corp., et al., supra*, and reflect what has become a cornerstone in the very foundation of railroad property law.

The impact of the action of the courts below extends far beyond the immediate rights of an obscure shortline railroad in central Kentucky. According to the Association of American Railroads, there are more than 170,000 miles of railroad right-of-way in this country. A fundamental characteristic of that right-of-way, grounded in a

century of jurisprudence, is that the right of possession is exclusive to the railroad. (Indeed, much of the entire body of railroad tort law is predicated on that concept.) The courts below would, with just a few keystrokes, totally eliminate this characteristic of railroad right-of-way, and would substitute, instead, the concept that such right-of-way may be subjected to any sort of physical intrusion which "will not interfere with the railroad's use of the right-of-way". This is just another way of saying that railroad right-of-way is not property entitled to the protection of the Constitution. The Petitioner, of course, would submit that this is bad Constitutional law, bad railroad law, bad property law and bad public policy. But, in any event, if such a fundamental aspect of the nature of railroad right-of-way is indeed to be so turned on its ear, it ought to be done so through a decision of the Court from which it arose, and not through an unpublished opinion of the Kentucky Court of Appeals and a one line order from the Supreme Court of Kentucky.

The decisions below have equally broad implications in derogation of the rule announced in *Loretto v. Teleprompter Manhattan CATV Corp., supra*. To the extent that the physical intrusion of a natural gas pipeline on a railroad's right-of-way does not constitute a taking subject to Constitutional protection, so do any other physical intrusions, including those of water lines, telephone lines, fiber optic cable lines and cable television lines. And to the extent that such intrusions do not amount to a taking of the property of a small Kentucky shortline, they do not amount to a taking of the property of the Norfolk Southern or the CSX.

CONCLUSION

This Court should grant a writ of certiorari to protect the Constitutional rights of the Petitioner railroad in its property; to preserve and effectuate the teachings of *Loretto v. Teleprompter Manhattan CATV Corp., supra,* and *Western Union Tel. Co. v. Pennsylvania R.R. Co., supra;* and to prevent those rights and teachings from being eroded and ignored in decisions of convenience, but of broad general import, such as those of the courts below.

Respectfully submitted,

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APPENDIX

NELSON CIRCUIT COURT

NO. 96-CI-00248

LOUISVILLE GAS AND
ELECTRIC COMPANY PLAINTIFF

VS. FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

R.J. CORMAN RAILROAD
CORPORATION DEFENDANT

* * *

On December 20, 1886, F.B. Offutt, a Nelson County landowner, executed a document which granted to the Middle Branch of the Cumberland & Ohio Railroad Company " . . . for its railroad, an unconditional right of way . . . for the width of one hundred (100) feet measured equally fifty (50) feet on each side of center line of said railroad." (See Exhibit "B" to original complaint). The aforementioned railroad is a predecessor of the defendant herein, R.J. Corman Railroad Corporation ("Corman"). The servient estate, owned by Offutt, is now owned by Medusa Aggregate Company ("Medusa").

A railroad has been operated upon and over the above described right-of-way from 1886 to the present.

On May 8, 1996, Medusa executed a "Grant of Easement" through which it granted to plaintiff, Louisville Gas & Electric Company ("LG&E") an easement thirty (30) feet in width which could be used by LG&E " . . . to construct, reconstruct, operate, maintain and remove

lines of pipe for the transportation of oil or gas . . . " (See Exhibit "A" to original Complaint).

LB&E's [sic] easement traverses Corman's at the railroad's 41 mile marker, on the Medusa property. LG&E's proposed use of its easement was the construction of a 12 inch, high pressure natural gas pipeline, to be housed in a 16 inch casing. LG&E and Corman initially entered into some negotiations concerning the construction of LG&E's pipeline through the railroad easement. It is undisputed that the pipeline was to be laid in accordance with American Railway Engineering Association specifications, i.e. approximately six (6) feet below the railroad tracks. LG&E proposed to accomplish that construction requirement by boring under the railroad bed.

Corman did not object to the method of construction contemplated by LG&E. Furthermore, Corman did not contend that the pipeline would interfere with any railroad activities presently carried out on that portion of its easement. Corman simply disputed the right of LG&E to encroach upon its railroad easement without compensation and resisted LG&E's efforts to proceed with the installation of the pipeline through its easement. This lawsuit then ensued. In its complaint, LG&E seeks, *inter alia,* to obtain an injunction prohibiting Corman from interfering with its construction and maintenance of the above referenced gas pipeline. Corman has countered with an Answer and Counterclaim wherein it seeks to have LG&E enjoined from encroaching upon its easement.

At a hearing on June 24, 1996, counsel for the respective parties agreed that since the facts, above recited,

were not in dispute, the legal issue in question could be submitted via cross-motions for summary judgment upon memoranda. Those memoranda have been filed and considered by the Court.

Although Corman cites the Court to various authorities alluding to the extraordinary or unusual nature of railroad right-of-ways or easements, *Figg v. Louisville & N.R. Co.*, 116 Ky. 135, 75 S.W. 269 (1903); *Ford v. Commonwealth*, 156 Ky. 428, 160 S.W. 1080 (1913); *Western Union Tel. Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 49 L.Ed. 312, 25 S.Ct. 133 (1904); *Donovan v. Pennsylvania Company*, 199 U.S. 279, 50 L. Ed. 192, 26 S. Ct. 91 (1905); *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *Turner v. Louisville & N.R. Co. v. Davidson's Adm'r*, 246 Ky. 231, 54 S.W. 2d 911 (1932); *Anderson v. Norfolk & Western Railway Co.*, Ky., 324 S.W. 2d 413 (1959), none of them constitutes a legal basis for elevating Offutt's 1886 grant to a fee interest. The grant was for an "unconditional right-of-way". It was an easement grant, nothing more, nothing less.

An easement is a right distinguished from ownership. *Inter-County Rural Electric Cooperative Corp. v. Reeves*, 294 Ky. 458, 171 S.W. 2d 978, or as held in *Henry Bickel Co. v. Texas Gas Transmission Corp.*, Ky., 336 S.W. 2d 345, 347 (1960),

> It is not a normal incident of a possessory land interest. Powell, *Real Property*, Vol. 3, Sec. 405. It is a privilege or an interest in land, *Asher v. Johnson*, 188 Ky. 702, 82 S.W. 300, but it is not an *estate* in "land" itself (citations omitted).

As defined in *Citizens Telephone Company v. C.,N.O.& T.P.R.R. Co.*, Ky., 233 S.W. 901 (1921),

> . . . a right of way is a limited estate in land, limited as to estate as well as to dimension, width, height, depth and length, and the grantee must keep within such limitations or he at once becomes a trespasser.

Thus, Medusa is the owner of the fee, with Corman having only an interest or privilege therein by virtue of the 1886 Offutt right-of-way grant.

So, the issue is what right has LG&E, under its express easement grant from Medusa, as against the first easement holder, Corman, to cross the right-of-way of Corman.

The answer is that LG&E has the right to cross Corman's right-of-way so long as it does not interfere with a reasonable use of the right-of-way by Corman for the purposes intended. In other words, LG&E can cross under the Corman easement, provided it does so in conformity with the American Railway Engineering Association specifications, and that it does not interfere with the normal and existing uses of the easement by the railroad. The only allegations of interference by Corman relate to possible, speculative circumstances which are insufficient to defeat LG&E's traversing rights.

The *Citizens Telephone Co.* case, supra, serves as authority for this finding and conclusion by the court. Specifically, the Court now paraphrases a portion of the penultimate paragraph on page 902 of that decision as the rationale in support of its ultimate finding herein, to-wit:

> So long as the structure below the track does not interfere with the full enjoyment of the right of way and is of such permanent and substantial nature as not to be a menace to those who have to pass over it, the owner of the easement has no right to require its removal, nor can such owner maintain an action for such purpose, for its domain has not been invaded nor has it suffered a wrong . . .

NOW, THEREFORE, THE PREMISES CONSIDERED, IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. That the motion of defendant, R.J. Corman Railroad Corporation, for summary judgment be and it is hereby denied.

2. That the motion of plaintiff, Louisville Gas & Electric Company, for summary judgment be and it is hereby granted.

3. That the defendant, R.J. Corman Railroad Corporation, its agents, servants and employees and all others acting in concert therewith, be and they are hereby permanently enjoined from interfering with Plaintiff's construction and/or maintenance of the natural gas pipeline, above identified, provided the construction and/or maintenance of same is performed in conformity with the specifications of the American Railway Engineering Association.

This is a final and appealable judgment and there is no just reason for delay.

DATED 7/12/96.

/s/ Larry D. Raikes
JUDGE, NELSON CIRCUIT COURT

DISTRIBUTION:

✓ Michael R. Engleman
✓ Thomas A. Donan
✓ David R. Irvin
✓ Alan Kent Akers, Sr.

Clerk Illegible Date 7/15/96

Entered: 7-15-96

DIANE THOMPSON, Clerk
Nelson Circuit & District Courts

By: Illegible Deputy Clerk

RENDERED: February 20, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 96-CA-002055-MR

R. J. CORMAN RAILROAD CORPORATION — APPELLANT

APPEAL FROM NELSON CIRCUIT COURT
V. HONORABLE LARRY RAIKES, JUDGE
CIVIL ACTION NO. 96-CI-000248

LOUISVILLE GAS AND ELECTRIC COMPANY — APPELLEE

OPINION

AFFIRMING

* * * * * * * * * * * *

BEFORE: EMBERTON, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, JUDGE. The issue raised in this appeal is whether a utility company that has permission from the fee owner to install a natural gas pipeline under a railroad right of way must also obtain, by negotiation or condemnation, authorization from the railroad to install the line and must compensate it for doing so. The circuit court ruled that the utility company's pipeline could be located under the railroad right of way if there was no interference with the railroad's use of its right of way and if certain construction standards were met. The railroad appeals.

The facts are not in dispute. Louisville Gas and Electric Company (LG&E) sought to install an underground gas pipeline through a railroad right of way owned by R. J. Corman Railroad Company (Corman). The pipeline is to be located approximately six feet underground in a manner that will not interfere with Corman's use of its right of way and is to be installed according to American Railway Engineering Association specifications. LG&E obtained an easement from Medusa Aggregate Company, the fee owner of the property impressed with the railroad's right of way.

LG&E undertook to construct the pipeline, but was met with opposition from Corman which removed the pipeline. LG&E sued the railroad seeking injunctive relief and damages for the destruction of its pipeline. Corman counterclaimed for damages resulting from LG&E's trespass on its right of way and sought a ruling that LG&E must institute an eminent domain action before entering upon the right of way. Both parties agreed to treat the matter as if pending on cross-motions for summary judgment. The circuit court ruled for LG&E, and Corman appealed.

Corman claims its right of way through a deed dated December 20, 1886, granting an "unconditional right of way". In *Illinois Central R.R. Co. v. Roberts*, Ky.App. 928 S.W.2d 822 (1996), this Court interpreted a railroad right of way as an easement saying that:

> Where, by instrument or deed, land is purportedly conveyed to a railroad company for the laying of a rail line, the presence of language referring in some manner to a "right of way"

> operates to convey a mere easement notwithstanding additional language evidencing the conveyance of a fee.

Id. at 825.

> A railroad easement, like other easements, is nothing more than the right of the railroad to pass over the land of others. In short, it is a right-of-way easement. In no way does it reflect title to or ownership of the land itself.

ID. at 826.

In *Central Ky. Natural Gas Co. v. Huls,* Ky., 241 S.W.2d 986 (1951), the fee owner proposed to construct a restaurant building over a high pressure gas transmission line located on an easement over the fee owner's land. While finding that the construction of the restaurant building would be a burden on the easement and an unwarranted violation of the gas company's rights, Kentucky's highest court acknowledged that "a right of way does not entitle the owner thereof to exclusive use of the land but only the use necessary to enable it to exercise its rights." *Id.* at 987.

Corman cites numerous cases involving railroad rights of way in support of its position, among them: *Anderson v. Norfolk and Western R. Co.,* Ky., 324 S.W.2d 413 (1959); *Louisville and Nashville R. Co. v. Davidson's Adm'r.,* Ky., 54 S.W.2d 911 (1932); *Turner v. Louisville and Nashville R. Co.,* Ky., 225 S.W. 1072 (1920); and *Ford v. Commonwealth,* Ky., 160 S.W. 1080 (1913). Each of these cases is distinguishable inasmuch as each addresses an issue of direct interference of the right of way owner's rights.

In a case that is on point, *Citizens' Telephone Co. v. Cincinnati, N. O. & T. P. R. Co.*, Ky., 233 S.W. 901 (1921), a railroad sued to enjoin a telephone company from erecting and maintaining telephone wires across the railroad's right of way. Kentucky's highest court rejected the railroad's claim, saying that:

> The ownership of an easement extends only to such height as reasonably to permit the full and free enjoyment thereof for the purpose for which it was granted or acquired, and no further. * * * Whatever may happen to the estate outside these limitations is of no concern to the holder of the right of way unless it directly or indirectly affects such right of way.

Id. at 903.

A similar issue was addressed in *Jefferson County v. South Central Bell Telephone Co.*, Ky.App., 555 S.W.2d 629 (1977), where a metropolitan sewer district and a telephone company claimed easements across the same property. This Court concluded that the "owners[']' right to use the land within the drainage easement included the right to grant additional easements so long as the new easements did not constitute an unreasonable burden upon the sewer district's existing easement." *Id.* at 630 (citation omitted).

As there is no question but that the construction of a gas pipeline beneath the railroad right of way will not interfere with Corman's use of the right of way easement, the circuit court properly dismissed Corman's complaint.

The judgement [sic] is affirmed.

ALL CONCUR.

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ON BRIEF:

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Supreme Court of Kentucky

98-SC-211-D
(96-CA-2055)

R.J. CORMAN RAILROAD CORPORATION — MOVANT

V. NELSON CIRCUIT COURT
NO. 96-CI-248

LOUISVILLE GAS AND ELECTRIC COMPANY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED October 7, 1998.

/s/ Robert F. Stephens
Chief Justice